LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 14 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 71-80

October Term, 1971

* * *

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

v.

JUAN D. HERNANDEZ,
Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

DUNKLIN SULLIVAN
Assistant Attorney General

Attorneys for Petitioner
P. O. Box 12548, Capitol Station
Austin, Texas 78711

INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	9
CERTIFICATE OF SERVICE	10
APPENDICES	
APPENDIX A	11
APPENDIX B	18
APPENDIX C	31
APPENDIX D	33

CITATIONS

CASES

	Page
Brooks v. Texas, 381 F.2d 619 (5th Cir., 1967)	8
Douglas v. California, 372 U.S. 353 (1963)	6
Gideon v. Wainwright, 372 U.S. 335 (1963)	6
Henry v. Mississippi, 379 U.S. 452 (1965)	2, 5
Hernandez v. State, 378 S.W.2d 311 (Tex.Crim.App. 1964)	3
Parker v. North Carolina, 397 U.S. 790 (1970)	5
Powell v. Alabama, 287 U.S. 45 (1932)	6
Rhay v. Browder, 342 F.2d 345 (9th Cir., 1965)	6
Williams v. Beto, 354 F.2d 698 (5th Cir., 1965)	6

UNITED STATES CONSTITUTION

Fourteenth Amendment	2

STATUTES AND RULES

28 U.S.C. §1254(1)	2
Federal Rules Civil Procedure, Rule 52(a)	9
Texas Penal Code (Vernon 1952) Article 63	2

IN THE

SUPREME COURT OF THE UNITED STATES

NO. ----------

October Term, 1971

* * *

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

v.

JUAN D. HERNANDEZ,
Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The State of Texas prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 15, 1971.

OPINION BELOW

The opinion delivered in the court below is reported at —— F.2d —— (1971) and is appended to this Petition as Appendix "A." A copy of the opinion of the United States District Court for the Southern District of Texas is appended hereto as Appendix "B." A Stay of Mandate was granted by the United States Court of Appeals to and including July 27, 1971.

JURISDICTION

As indicated above, the opinion of the United States Court of Appeals was entered on April 15, 1971. (See Appendix "A".) A copy of the judgment is attached

hereto as Appendix "C." The State of Texas thereafter, on April 27, 1971, filed a Petition for Rehearing with the suggestion that such petition be heard en banc, and said petition was denied May 12, 1971. (See Appendix "D".)

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Should a constitutional rule be imposed which automatically proscribes the trial of a man in jail clothes as being violative of the presumption of innocence without regard to the necessity of an objection as has previously been required by *Henry v. Mississippi*, 379 U.S. 452 (1965), and without regard to an attorney's decision that appearance in jail clothes is, in certain circumstances, a matter of trial strategy?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Hernandez was convicted on October 23, 1963, in the Criminal District Court of Harris County, Texas, for having killed a twelve year old boy while driving an automobile in an intoxicated condition. This felony offense carries a penalty of from two to five years; however, Hernandez had on two previous occasions also been charged and convicted of theft. Under the mandatory provisions of Article 63, Texas Penal Code,

Hernandez was sentenced to life imprisonment, the only punishment allowed by law for a third time felony offender.

An appeal was taken from the judgment of the trial court, but the Texas Court of Criminal Appeals affirmed the conviction, *Hernandez v. State*, 378 S.W.2d 311 (Tex.Crim.App. 1964). It is to be noted that Hernandez did not raise on appeal the issue raised in his application for writ of habeas corpus.

In 1967, Hernandez sought relief from the convicting court; and later from the Court of Criminal Appeals in applications for writs of habeas corpus, but without success. Hernandez then filed his application for writ of habeas corpus in the United States District Court for the Southern District of Texas and was given an evidentiary hearing on September 15, 1969. The United States District Court upheld Hernandez's conviction, holding that his civilian clothes would have been made available to him had he or his attorney so requested, and also that if there was any error in trying Hernandez in jail clothing, the evidence of guilt was so overwhelming as to make any error harmless.

The United States Court of Appeals reversed the holding of the District Court below, and held that trying Hernandez in his jail clothes infringed a fundamental right—the presumption of innocence.

REASONS FOR GRANTING THE WRIT

1. The Opinion Of The Fifth Circuit Completely Negates The Holding In Henry v. Mississippi, 379 U.S. 452 (1965), Requiring That A Contemporaneous Specific Objection Be Made Pointing Out Alleged Trial Errors.

The federal district court found that:

> "Although these clothes (Hernandez's civilian clothes) would have been made available to him on request, he failed to do so either to his attorney or the court. While testifying, he did complain that he was cold, whereupon he was furnished a jacket. Other than that, neither he nor his attorney objected to his being tried in prison garb." (R. 76.) (Appendix B, pages 26-27.)

Hernandez's counsel testified at the federal habeas hearing that:

> "Of course, I had been, once before I had made such a motion in Judge Kirchheimer's court and he said, if you want to outfit them with clothes, well, do so. You are free to do so." S/F 10.

He further testified at pages 11 and 12:

> "Q Did I understand your prior testimony to be that you had made motion, or had to Judge Kirchheimer in the past, requesting that a defendant be dressed in something other than his prison clothes?
>
> "A Yes. I have made motions before, in the past, and the Judge told me if I wanted him dressed in any other clothes besides those furnished by the County to bring him some in, and of course, I can't afford to do that."

At page 43 he stated:

> "Q Would the Judge have permitted him to wear the clothes he was booked in on when he was picked up?
>
> "A Yes, I am sure he would, on request."

The attorney further testified that the judge would have granted him a delay of several hours to obtain

clothes from the Salvation Army or Goodwill Industries at no cost if he had so requested:

> "I would say they would give you maybe three or four hours to get clothes, but over that, I am sure they wouldn't." S/F 44, 45.

It is undisputed that Hernandez's counsel made no objection to Hernandez being tried in his jail clothes, and the State of Texas submits that it would be a mockery of justice to overturn Hernandez's conviction because he was tried in jail clothing when, (a) no objection or request was made by the defense for Hernandez to be tried in civilian clothes and, (b) Hernandez's attorney testified that had he so requested, the trial judge would have let him be tried in his civilian clothes.

This Court has made clear in *Henry v. Mississippi*, supra that the rule requiring contemporaneous specific objections serves a legitimate state interest, for by immediately apprising the trial judge of these objections, counsel gives the trial court an opportunity to rule on the objection, and to take whatever steps the court deems proper in view of the objections. *Parker v. North Carolina*, 397 U.S. 790 (1970), reaffirms this Court's position in regard to a defendant's failure to timely raise his objection. At page 798, this Court held,

> "Because Parker had failed to raise his objection in timely fashion, relief was unavailable. This state rule of practice would constitute an adequate state ground precluding our reaching the grand jury issue if this case were here on direct review. See Fay v. Noia, 372 U.S. 391, 428-429 (1963). We are under similar constraint when asked to review a state court decision holding that the same rule of practice requires denial of collateral relief."

2. The Fifth Circuit's Opinion In Hernandez Overturns The Well Established Rule That When A Defendant Has Counsel, Counsel Is The Manager Of The Lawsuit.

Hernandez's attorney testified at the federal habeas corpus hearing that he had tried and won many cases in which defendants were tried in jail clothes, and that the reason he thought he won some of them was because the jail clothes invoked jury sympathy. S/F 13, 14. The Fifth Circuit held nevertheless that the appearance of Hernandez in jail clothes as trial strategy to evoke jury sympathy was unsupported by the record. The Fifth Circuit further held that Hernandez did not waive his right to be tried in civilian clothes, even though neither he nor his attorney made any objection.

The Court of Appeals for the Ninth Circuit in *Rhay v. Browder*, 342 F.2d 345 (9th Cir. 1965), citing *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Powell v. Alabama*, 287 U.S. 45 (1932) states:

> ". . . we are in hearty agreement with these views and we think that it inevitably flows from them that, when a defendant has counsel, as Browder did, it is counsel's decision on a question such as is here involved that must control. *Counsel is the manager of the lawsuit* . . . (Emphasis added.) In the nature of things he must be, because he knows how to do the job and the defendant does not. That is why counsel must be there."

In *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965) the Fifth Circuit said:

> "When one seeks the assistance of counsel, he thereby confesses his own inadequacy in the field and stipulates his willingness, like any other cli-

ent, . . . to be bound by the presumably superior knowledge of the professional man on whose assistance he proposes to defend."

The United States District Court found that Hernandez "had effective assistance of counsel." R. 70. The State of Texas submits that when a defendant is represented by competent counsel, counsel is the manager of the lawsuit. The defendant therefore is bound by the superior knowledge and tactical decisions made by his attorney.

3. The Fifth Circuit's Holding In This Case Will Have A Catastrophic Impact On Criminal Jurisprudence In Texas, And In the Other States Within The Fifth Circuit.

The Fifth Circuit's unequivocal holding that Hernandez should be granted a new trial because trying him "in his prison clothing infringed a fundamental right—the presumption of innocence," will cause a flood of writs to be filed by prisoners tried, or contending they were tried in their prison clothes. Many defendants have been tried in jail clothes without objection, although their civilian clothes would have been furnished upon request.

The Fifth Circuit in their opinion on rehearing, (Appendix "D"), attempted to modify their original holding by stating that each case must be considered in its own factual context, and by saying that "a defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error." However, this is exactly what happened in Hernandez's case; that is, Hernandez remained silent, willingly went to trial in prison garb, and now claims error.

The State of Texas would have no quarrel with the Fifth Circuit's decision if Hernandez had been *forced* to trial in jail clothing, or had his attorney been held ineffective as was the attorney in *Brooks v. Texas*, 381 F.2d 619 (5th Cir. 1967). The fact that Hernandez was put to trial in jail clothes was through no fault of the State of Texas. The record is clear that (a) Hernandez was not forced to wear jail clothes, (b) his attorney was competent, and (c) the trial judge would have permitted Hernandez to wear civilian clothes upon request, and would have granted a three or four hour delay to enable him to secure civilian clothes. S/F 10, 11, 12, 43, 44.

In overturning Hernandez's conviction, the Fifth Circuit has in effect held that whenever a defendant is tried in jail clothes, he has been denied a fundamental right, regardless of the failure to object, or the possibility that trial strategy dictated the jail clothes garb. Any defendant who was tried in his prison clothes on either a primary conviction or a prior conviction used for enhancement, will now be entitled to a new trial under the Fifth Circuit's ruling.

4. This Court In The Exercise Of Its Power Of Supervision Should Instruct The Fifth Circuit To Follow The Findings Of Fact Made By The United States District Court.

As pointed out on page 4, the United States District Court found that Hernandez's civilian clothes would have been made available to him on request. The Fifth Circuit completely disregarded this finding and found instead "that a motion for change of attire, in counsel's opinion, would have been denied as frivolous." A careful reading of the record reveals that this opinion of

Hernandez's counsel had reference to a motion directing the state to furnish civilian clothes for a defendant at state expense. S/F 9-14, 43-45. There is an abundance of evidentiary support in the record for the District Court's finding, and the Fifth Circuit, by invading the District Court's province as fact finder, has completely disregarded Rule 52(a) F.R.C.P., and a long line of cases holding that findings shall not be set aside unless clearly erroneous.

The Firth Circuit further misinterpreted the record by holding that Hernandez's counsel had not given a thought as to whether Hernandez's appearance in prison garb was trial strategy to evoke jury sympathy. The Court labeled as "Monday quarterbacking," counsel's opinion that he had won many cases in which defendants were tried in prison clothes and that the reason he thought he won some of them was because the jail clothes invoked jury sympathy. S/F 13, 14. Hernandez's counsel did testify he did not recall what mental processes he went through in considering whether it would be beneficial for Hernandez to be tried in prison clothes, but he did not say as the Fifth Circuit held that he had not given this question a thought. The only "Monday quarterbacking" in this case was that practiced by the Fifth Circuit.

CONCLUSION

For the above and foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

DUNKLIN SULLIVAN
Assistant Attorney General

Attorneys for Petitioner

P. O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Dunklin Sullivan, a member of the Bar of the Supreme Court of the United States, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on counsel for the Respondent by depositing same in the United States Mail, postage prepaid, addressed to: Mr. J. M. Hopper, Attorney at Law, 2133 First City National Bank Building, Houston, Texas, on this the —— day of July, 1971.

DUNKLIN SULLIVAN
Assistant Attorney General

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30085

JUAN D. HERNANDEZ,
Petitioner-Appellant,

versus

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

---

(April 15, 1971)

Before WISDOM, THORNBERRY and DYER,
Circuit Judges.

DYER, Circuit Judge: Hernandez appeals from the District Court's denial, after an evidentiary hearing, of his petition for writ of habeas corpus. He asserts a deprivation of his Fourteenth Amendment rights because of the prosecutor's presentation to the state court jury, empaneled to try him for a felony offense, the fact of his two prior convictions, and because of a further violation of his rights in requiring

him to stand trial in prison garb. On the latter ground we reverse.

Hernandez was convicted in the Criminal District Court of Harris County, Texas, for having killed a twelve-year-old boy while driving an automobile in an infoxicated condition. This felony offense carries a penalty of from two to five years; however, Hernandez was tried as an habitual criminal because of two prior felony car thefts, and as a result of this third conviction for a felony, he received a life sentence.[1] The two previous convictions were established in accordance with Texas procedure of long standing by stipulation in open court before the jury and by the introduction of certified copies of the judgments and sentences in each case. Counsel for Hernandez in the state trial was not aware, however, of the change in Texas law at the time of trial to the effect that if a defendant offers to fully stipulate as to prior convictions, the state cannot introduce evidence on that point. *Pitcock v. State,* Tex. Cr. App. 1963, 367 S.W. 2d 864. Thus it is argued that there was not even a "deliberate choice of trial strategy" concerning whether Hernandez should testify or exercise his privilege of remaining silent. In the latter event, it is argued, the state would have been foreclosed from using rebuttal witnesses, who gave damaging evidence against Hernandez.[2]

---

[1] The Texas recidivist statute, Tex. Pen. Code Ann. art. 63 (1952), imposes a mandatory life sentence upon whomever "shall have been three times convicted of a felony less than capital. . . ."

[2] Effective January 1, 1966, Texas passed a new law pursuant to which the jury is not given the recidivist issue until it has first found the defendant guilty under the principal charge. Tex. Code Crim. Proc. Ann. art. 36.01 (1966); *see* Tex. Code Crim. Proc. Ann. art. 37.07 (Supp. 1970).

Hernandez does not, and indeed could not, charge his trial counsel with incompetency because counsel was unaware of *Pitcock*. That decision by the Texas Court of Criminal Appeals could not have appeared in an advance sheet until only a short time prior to trial. Furthermore, Hernandez' argument that he was deprived of his Fourteenth Amendment rights in publishing his two prior convictions to the jury is foreclosed by *Spencer v. State*, 1967, 385 U.S. 554. In that case the Supreme Court had before it three Texas recidivist statute cases and concluded that it did not violate the Fourteenth Amendment for the state to prove the prior convictions in the presence of the jury. The Court recognized that: "By judicial gloss it appears that, at least in noncapital cases, a defendant by stipulating his prior convictions could keep knowledge of them away from the jury. *See Pitcock v. State*, 367 S.W. 2d 864. . . . In the view we take of the constitutional issue before us we consider it immaterial whether or not that course was open to any of the petitioners." *Id.* at 556-57 n. 2. This view was restated in *Burgett v. Texas*, 1967, 389 U.S. 109, in which the Court noted that "[t]he rule adopted in *Spencer* went so far as to allow the State to enter evidence on the prior crimes even though a defendant might be willing to stipulate the earlier convictions." *Id.* at 117.

We turn now to Hernandez' assertion of error because he was tried in his prison garb described as a white T-shirt with "Harris County Jail" stamped on the front, and dungarees with the same inscription on both the front and back. Hernandez had worn civilian clothes when he entered the jail, and they were available at all times, but neither he nor his counsel requested that Hernandez be permitted to wear them at

the time of trial. No objection was made concerning his appearance. Nevertheless, Hernandez now urges that he was entitled to the garb of innocence instead of the garb of guilt and that he was thus deprived of the due process of law guaranteed by the Fourteenth Amendment.

Appellee counters with the argument that Hernandez made no objection; that counsel for Hernandez, as a matter of trial strategy, expected the defendant's appearance to evoke jury sympathy; and that, in any event, if there was error, it was harmless.

The record makes it abundantly clear that no objection was lodged by counsel to the prison garb worn by Hernandez because, at that time, it was common practice to try prisoners held in jail in their prisoner clothing, and that a motion for a change of attire, in counsel's opinion, would have been denied as frivolous. This is not to say that counsel minimized the prejudice emanating from the accused's appearance, for he opined in the court below that a person tried in clothes that had "Harris County Jail" conspicuously stamped on them "would show an indication of guilt to the jury."

The District Court agreed with counsel's evaluation of the situation and correctly characterized as "rather absolute language" what we said in *Brooks v. Texas*, 5 Cir. 1967, 381 F.2d 619, that: "It is inherently unfair to try a defendant for [a] crime while garbed in his jail uniform, especially when his civilian clothing is at hand. No insinuations, indications or implications suggesting guilt should be displayed before the jury, other than admissible evidence and permissible argument." *Id.* at 624. The trial judge went on to say:

"What was inherently unfair in *Brooks v. Texas, supra,* is also inherently unfair in this case. There is little doubt in this Court's mind that negative inferences can be, and more than likely are, created in the minds of the jurors when the accused is brought into court and tried in prison clothing. We agree.

Appellee rests heavily on *Xanthull v. Beto,* S.D. Tex. 1970, 307 F. Supp. 903, in which the court found that trial in jail clothing was not inherently prejudicial. The court in *Xanthull* relied on *McFalls v. Peyton,* W.D. Va. 1967, 270 F. Supp. 577, *aff'd.* 4 Cir. 1968, 401 F.2d 890, *cert. denied,* 394 U.S. 951, which in turn relied on *Gregory v. United States,* 8 Cir. 1966, 365 F.2d 203, *cert. denied,* 385 U.S. 1029. But *Gregory* is a handcuff case, not a prison garb case, and an analogy cannot be drawn between them. It was for this very reason that the Court took pains in *Brooks* to distinguish *Mallone v. Lanier,* 5 Cir. 1966, 354 F.2d 940—also a handcuff case. *Brooks v. Texas, supra* at 624. While "[f]reedom from shackling and manacling of a defendant during the trial of a criminal case has long been recognized as an important component of a fair and impartial trial," *Odell v. Hudspeth,* 10 Cir. 1951, 189 F.2d 300, 302, *cert. denied,* 342 U.S. 873, it is undoubted that a trial judge has discretion to order that a defendant be handcuffed during trial to prevent his escape, to prevent him from injuring bystanders and officers of the court, or to maintain a quiet and peaceable trial. The wearing of prison garb certainly could have little or nothing to do with security precautions in this case. We conclude that trying Hernandez in his prison clothing infringed a fundamental right—the presumption of innocence.

The next contention of appellee, that Hernandez was permitted by his counsel to appear in prison garb as trial strategy to evoke jury sympathy, is unsupported in the record. Counsel for Hernandez, while speculating that the jury might react sympathetically in such a situation, frankly conceded that he had not given this a thought, and that his view, expressed to the court below, was "Monday quarterbacking."

Finally, appellee insists that the District Court properly found that if there was error in trying Hernandez in prison clothing, the error was harmless. The District Court, after determining that the evidence of guilt was overwhelming and that the evidence in support of the defense was almost nil, found that "it cannot be concluded that the trial of petitioner in everyday street clothing would have tipped the balance of the scales of justice in his favor."

The test used by the District Court to determine whether the error was harmless was improper. The quantum of error cannot be measured in terms of tipping the scales of justice. "Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of . . . [the prison garb worn by the defendant] on the minds of an average jury." *Harrington v. California*, 1969, 395 U.S. 250, 254. Before "a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 1967, 386 U.S. 18, 24; *cf. United States v. Manning*, 5 Cir. 1971, —— F.2d —— [——, No. 28805]; *Simpson v. Wainwright*, 5 Cir. 1971, —— F.2d —— [March 12, 1971, No. 29109].

While it is true that the state presented the testi-

mony of three policemen, three children and an adult to the effect that they could smell alcohol on Hernandez, that he staggered, and that his eyes were blurred and misty, it was also shown that he was injured in the accident, was bleeding and that he was taken to the hospital. Under these circumstances we cannot equate the inherent unfairness of being tried in prison garb with harmless error. The probable impact on the jury of Hernandez' appearance in the courtroom makes it impossible for us to declare a belief that it was harmless beyond a reasonable doubt.

We reverse and remand with instructions to grant the writ of habeas corpus unless the state grants Hernandez a new trial within a reasonable time.

REVERSED and REMANDED with instructions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 67-H-922

JUAN D. HERNANDEZ,

Petitioner

v.

DR. GEORGE J. BETO, Director,
Texas Department of Correctrons,

Respondent.

Memorandum and Order

While driving his car on a street in the City of Houston on the afternoon of May 26, 1963, Juan Hernandez, petitioner in this action for a writ of habeas corpus, struck and fatally injured young Ernest Ortega who, together with a friend, was riding his bicycle near the right curb. Immediately prior to the collision, petitioner's car, which had been traveling in the middle lane, suddenly veered to the right. Witnesses present observed petitioner's demeanor and appearance and judged him to be drunk.

On the strength of this and other items of evidence, petitioner was indicted by the Harris County Grand Jury and, on October 23, 1963, was convicted of murder with an automobile. This felony conviction was not the first for petitioner: He had on two previous occasions also been charged and convicted of theft. Under the mandatory provisions of article 63, Texas Penal Code, petitioner was sentenced to life imprison-

ment, the only punishment allowed by law for a third-time felony offender.

An appeal was taken from the judgment of the trial court, but the Texas Court of Criminal Appeals affirmed the conviction. *Hernandez v. State*, 378 S.W.2d 311 (Tex. Crim. App. 1964). An application for habeas corpus was then filed in this Court, but dismissed because of petitioner's failure to pursue the remedies available to him under article 11.07, V.A.A.C.P. *Hernandez v. Beto*, C. A. 67-H-272 (S.D. Tex. 1967). Petitioner thereupon sought relief from the convicting court and later from the Court of Criminal Appeals, but without success in each instance. He subsequently refiled his application in this Court and was given an evidentiary hearing which was held on September 15, 1969. Petitioner has exhausted his state remedies as 28 U.S.C., section 2254 tells him he must and a decision on the merits is now proper. See *Texas v. Payton*, 390 F.2d 261 (5th Cir. 1968).

As is often true when prisoners do their own drafting, the inarticulately worded application in this case is not a model of clarity. With a broad reading of it, however, the following contentions can be distilled from the somewhat verbose contents:

1. That petitioner was denied the effective assistance of counsel;

2. That it was constitutionally improper for petitioner's two prior convictions to be made known to the jury by stipulation and the reading of the indictment;

3. That a Fourteenth Amendment violation likewise resulted because petitioner was tried while clad in prison garb;

4. That the stipulated testimony of Dr. Coulter, a medical expert, denied petitioner the Sixth Amendment right of confrontation;

5. That petitioner was not properly warned of his rights when arrested; and

6. That the conviction was at variance with the trial court's charge to the jury.

I.

The basis upon which petitioner contends that he did not have effective representation from his court-appointed attorney is that attorney's failure to call as a witness Carolyn Nova, a passenger in petitioner's car at the time of the accident. In addition, says the petitioner, his attorney failed to object to petitioner's being tried in the clothes supplied by the Harris County Jail. These facts are cited as demonstrating the ineffectiveness of legal assistance provided.

In that regard, effective assistance of counsel, guaranteed by the Sixth Amendment to the Constitution, has been defined in *Brown v. Beto*, 377 F.2d 950 (5th Cir. 1967). There, it was said:

> "'. . . Incompetency of counsel such as a denial of due process and effective representation by counsel must be such as to make the trial a farce, sham, or mockery of justice.' This court has defined 'effective counsel' in terms of a 'reasonable counsel' standard: 'We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. . . .'" (377 F.2d 957-58)

As was said in *Williams v. Beto*, 354 F.2d 698, 705 (5th Cir. 1965): "Lawyers are not required to be infallible. If they were, law practice would soon disappear. . . ."

Judged by these standards, the contention that petitioner was denied effective legal assistance is one utterly devoid of merit. Carolyn Nova, whose testimony may or may not have been favorable to the defense, was not called because she could not be found, either by the state, which subpoenaed her, or by the defense counsel, who certainly made diligent efforts to locate her. Similarly, a finding of ineffective counsel is not justified simply because no objection was made to petitioner's being tried in prison garb. In fact, most of the evidence bearing on the effective representation issue is directly to the contrary. The defense counsel testified that he spent somewhere between fifty and sixty hours investigating the case prior to trial. Moreover, there was also evidence that the defense counsel was reputed among local prosecution officials to be competent and able. Even judged by hindsight, the defense attorney gave petitioner his best efforts. And it is positively clear that the nature of the legal services rendered were not of such substandard quality to make the trial a sham, farce, and mockery of justice. Compare this Court's opinions in *King v. Beto*, —— F. Supp. —— (S.D. Tex. Nov. 5, 1969), and *Chalk v. Beto*, C.A. No. 69-H-119 (S.D. Tex. 1969).

It is the finding of this Court, after considering the record as a whole, that petitioner had effective assistance of counsel.

II.

In the course of petitioner's trial, the fact of his prior convictions was made known to the jury in sev-

eral different ways. These include the reading of the indictment, which contained a recitation of the prior felony offenses, a stipulation by the opposing attorneys, documented evidence, and direct and cross-examination of petitioner when he undertook to testify on his own behalf. Petitioner contends that telling the jury of his previous offenses under circumstances in which there was only one possible term of punishment denied him rights under the Fourteenth Amendment. Alternatively, it is contended that petitioner's attorney failed to assert a rule of Texas case law which holds that a stipulation that a criminal defendant has been previously convicted prevents the jury from learning of that conviction. An attempt is made to give this argument constitutional integrity by the suggestion that failure to raise the issue denies due process.

Petitioner's attorney apparently not only believed that it was legally impossible to prevent the jury from learning of the prior convictions, but that it might even have beneficial side effects. He testified that he thought if the jury knew that petitioner had pled guilty on two prior occasions they might be inclined to believe that he was truthful in pleading not guilty to the charges against him at that time. Given the above circumstances, petitioner nevertheless contends that he did not waive the constitutional issue by offering testimony because he was faced with the same alternatives as the petitioner in *Moreno v. Beto*, 415 F.2d 154 (5th Cir. 1969).

These arguments must fail because of the invalidity of several assumptions on which they are based. The most important of these is that neither the manner in which the prior convictions were presented to the jury

nor the presentation itself was unconstitutional. In *Spencer v. Texas,* 385 U.S. 544 (1967), the Supreme Court reviewed three convictions in which evidence of prior convictions for purposes of penalty enhancement had been placed before the jury. With one of the convictions the jury assessed the same mandatory life sentence under article 63 that was set for petitioner here. In holding there to be no Fourteenth Amendment violation, the Court said:

> "Cases in this court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. . . . But it has never been thought that such cases establish this Court as a rule making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority. In the face of the legitimate state purpose and the long-standing and wide-spread use that attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional and the Due Process Clause as it has been interpreted and applied in our past cases. As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a sure promise of protection to the prisoner at bar.' . . ." (385 U.S. 563-64)

It is not, and should not, be the business of a federal court to interfere with the operation of state procedural rules where that interference is not justified. And interference is justified only in those cases in which there is a clear transgression of due process. This is not such a case.

Petitioner's contention that he was denied due process because of the failure to raise the alleged rule of Texas case law mentioned above is similarly without foundation. This claim is essentially a matter of state law and a rearrangement of the wording does not give it constitutional stature. Moreover, as unsettled as Texas law was until the practice of reading the enhancement portion of the indictment was altogether abandoned by the comprehensive changes made in the revised Texas Code of Criminal Procedure which took effect in 1966, it is not certain whether petitioner had a clear right to prevent the jury from discovering the fact of his prior convictions. Compare *Pitcock v. State*, 367 S.W.2d 864 (Tex. Crim. App. 1963) with *Crocker v. State*, 385 S.W.2d 392 (Tex. Crim. App. 1964); *Sims v. State*, 388 S.W.2d 714 (Tex. Crim. App. 1965); *Ross v. State*, 401 S.W.2d 844 (Tex. Crim. App. 1966). The conclusion that petitioner was not denied rights under state law is fortified by the finding above that he had effective assistance of counsel.

Unlike *Moreno v. Beto, supra*, the petitioner did not choose to take the witness stand under the dictates of an unconstitutional procedure. There, Moreno's trial attorney decided not to base his objection to the admission of his client's confession on involuntariness because under the then existing Texas procedure, prior to the decision in *Jackson v. Denno*, 378 U.S. 368 (1964), Moreno would have been exposed on cross-examination to questions concerning his prior convictions. It was held that there could be no deliberate bypass of state procedural practices, as *Fay v. Noia*, 372 U.S. 391 (1963), said must be found before a federal habeas applicant could be deemed to have waived his right to raise the constitutional issue asserted for

relief, when the failure to raise that issue was dictated by an unconstitutional procedure. In this case, however, there is no evidence that petitioner testified because of an unconstitutional procedure. Even on the assumption that the procedure is constitutional, it is likely, due to the overwhelming evidence of guilt, that petitioner testified because it was the only way he could rebut the evidence of drunkeness admitted against him. He was aware that there was no legal compulsion for his doing so. Yet, even though he may be truthful in saying that he did not want to get upon the witness stand, the ultimate choice to testify was his to make. In order to determine if petitioner has deliberately bypassed the rules of orderly state procedure, it is appropriate to examine at this point what a deliberate bypass is.

Whether or not there is a deliberate by-pass in any case depends in turn upon whether there is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). When a deliberate by-pass is found, a federal court has a limited discretion to deny habeas corpus on the ground that the petitioner effected a binding waiver. *Fay v. Noia, supra.* The Supreme Court has outlined the boundaries of this discretion in these terms:

> "But we wish to make very clear that this grant of discretion is not to be interpreted as introducing legal fictions into federal habeas corpus. The classic definition of waiver enunciated in Johnson v. Zerbst, . . . furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts,

whether for strategic, tactical, or any other reasons that can be fairly described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing on the applicant's default. . . . At all events, we wish it clearly understood that the standard here put forth depends upon the considered choice of the petitioner. . . . A choice made by counsel not participated in by petitioner does not automatically bar relief. . . ." (372 U.S. 439)

Even under this set of strict standards, there can be no doubt that petitioner, after consulting with competent counsel, chose of his own free will to testify.

For the foregoing reasons, petitioner's contention on this point will be overruled.

III.

Petitioner was tried in prison clothing. This consisted of a T-shirt with "County Jail" written across the front and a pair of khaki pants with the inscription "Harris County Jail" on both front and back. On several occasions during the trial, petitioner was identified by various witnesses, thereby drawing to him the attention of the jury, but no specific mention was made pertaining to the clothes he was wearing. When petitioner was arrested, he was clad in a pair of charcoal black slacks and a black short-sleeved shirt with gold dots. Although these clothes would have been made available to him on request, he failed to do so either to his attorney or the court. While testifying, he did complain that he was cold, whereupon he was fur-

nished a jacket. Other than that, neither he nor his attorney objected to his being tried in prison garb.

A general statement on the fairness of trying prisoners so dressed is found at 21 Am.Jur.2d, Criminal Law, Section 239 (1965):

> "Since the defendant, pending and during his trial, is still presumed innocent, he is entitled to be brought before the court with the appearance, dignity, and self respect of a free and innocent man, except as the necessary safety and decorum may otherwise require. He is therefore entitled to wear civilian clothes rather than prison clothing at his trial. It is improper to bring him into the presence of the jury which is to try him, or the venire from which his trial jury will be drawn, clothed as a convict."

In *Brooks v. Texas*, 381 F.2d 619 (5th Cir. 1967), the court stated in rather absolute language:

> "It is inherently unfair to try a defendant for a crime while garbed in his jail uniform, especially when his civilian clothing is at hand. No insinuations, indications or implications suggesting guilt should be displayed before the jury, other than admissible evidence and permissible argument." (381 F.2d 624)

What was inherently unfair in *Brooks v. Texas, supra*, is also inherently unfair in the instant case. There is little doubt in this Court's mind that negative inferences can be, and more than likely are, created in the minds of jurors when the accused is brought into court and tried in prison clothing. As was said in *Eaddy v. People*, 115 Col. 488, 174 Pac.2d 717, cited in *Dennis v. Rees*, 278 F.Supp. 354 (E.D. La. 1968), "The presumption of innocence requires the garb of innocence."

Judge Noel of this court, in *Xanthull v. Beto*, —— F.Supp. —— (S.D. Tex. 1970), recently discussed this problem. The result reached by Judge Noel in that case is the same as the result reached by this Court in this case, as will be discussed later in this opinion; and to the extent of the result reached there, this Court concurs. However, in the *Xanthull* opinion, Judge Noel indicated disagreement with the above quoted statement from *Brooks v. Texas*, *supra*, and the general statement from 21 Am.Jur.2d, *supra*, and further indicated he is of the opinion that the fact that an accused wore jail clothes during a jury trial does not create a single negative inference. This Court completely disagrees with Judge Noel's position in this respect.

What has been said, however, does not automatically mean the petitioner must be given a new trial. The error of trying petitioner in jail clothing under the circumstances of this case is harmless. The evidence of guilt was overwhelming. It was established by the testimony of various witnesses for the state that petitioner's car behaved erratically immediately prior to the accident, that petitioner appeared to be drunk immediately after, and that he subsequently escaped from police custody when taken to the hospital for treatment of a cut on his leg. Moreover, photographs of the accident scene showing the boy's body in front of the car were admitted into evidence. In rebuttal, the petitioner said that he had drunk only two and one-half bottles of beer and that he was not drunk, that he lost control of the automobile when the wheels began to shimmy, and that he escaped because he panicked. The evidence in support of his defense was minimal, and, in fact, almost nil. This being so, it cannot be concluded that the trial

of petitioner in everyday street clothing would have tipped the balance of the scales of justice in his favor.

IV.

Petitioner's other contentions are also without merit. The complaint that his Sixth Amendment right of confrontation was denied by his attorney's stipulation to the testimony of the medical expert is overruled because that stipulation was not in disharmony with the defensive matters raised. The argument relating to the conviction being outside the jury charge is purely a matter of state law. And, finally, whether or not petitioner was apprised of his rights when arrested does not raise a substantial federal question. *Johnson v. New Jersey*, 384 U.S. 719 (1966), specifically held that the cases of *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Miranda v. Arizona*, 384 U.S. 436 (1966), on which petitioner bases this claim, were not to be retroactively applied. Petitioner's conviction became final at a time prior to either of these decisions.

It is therefore ORDERED, ADJUDGED, AND DECREED that the application for habeas corpus relief be, and it is hereby, denied. This Memorandum and Order will constitute the findings of fact and conclusions of law of this Court. The Clerk is directed to file this Memorandum and Order and send copies of same to both petitioner and the Attorney General of Texas.

DONE at Houston, Texas this 6th day of March, 1970.

JOHN V. SINGLETON, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 67-H-922

JUAN D. HERNANDEZ,

Petitioner

v.

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,

Respondent.

FINAL JUDGMENT

In accordance with this Court's Memorandum and Order contemporaneously filed herewith, and for the reasons given therein,

It is ORDERED, ADJUDGED, AND DECREED that the application for a writ of habeas corpus be, and it is hereby, denied.

The Clerk is directed to file this Final Judgment, and send copies of same both to petitioner and the Attorney General of Texas.

DONE at Houston, Texas this 6th day of March, 1970.

JOHN V. SINGLETON, JR.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30085

D. C. Docket No. CA 67-H-922

JUAN D. HERNANDEZ,
Petitioner-Appellant,

versus

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

Before WISDOM, THORNBERRY and DYER,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and

the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that respondent-appellee pay the costs on appeal in this Court.

April 15, 1971

Issued as Mandate:

A true copy;
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By: MARYETTE KEMPFF
Deputy
New Orleans, Louisiana
June 22, 1971

APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30085

JUAN D. HERNANDEZ,
Petitioner-Appellant,

versus

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 15, 1971, 5 Cir., 1971, —— F.2d ——.)

(May 12, 1971)

Before WISDOM, THORNBERRY and DYER, Circuit Judges.

PER CURIAM: Appellee's petition for rehearing states, "Surely some burden must be put on the defendant and his attorney to make known that he desires to be tried in civilian clothes before the state can be held accountable for his being tried in jail clothes." We agree, and our opinion is not to the contrary. A defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error.

In this case Hernandez' counsel did not object to the jail clothing because, from past experience, he thought that a motion for change of attire would have been a frivolous motion. We cannot accept this as a voluntary waiver by Hernandez.

We do not paint with a broad brush these types of cases. Each case must be considered in its own factual context.

The petition for rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc is DENIED.